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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. [redacted] 840

DOMINICK F. PADUANO, KATE F. WHEELAN, JUDITH WEINER and NICHOLAS G. DeJOY,

Petitioners,

against

CITY OF NEW YORK, ROBERT F. WAGNER, as Mayor of the City of New York, and ARMAND D'ANGELO, as Commissioner of the Department of Water Supply, Gas and Electricity of the City of New York,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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PAGE

INDEX

	PAGE
Citations to Opinions Below	3
Jurisdiction	3
Questions Presented	3
The Record	5
Constitutional Provisions and Statutes Involved	6
This Case is Unique	7
Statement of the Case	11
The Parties and Nature of the Action	11
Reasons for Granting the Writ	13
Summary of Argument	13
Argument	14
Conclusion	23

TABLE OF AUTHORITIES

Cases:

Anderson v. *Moses*, 185 F. Supp. 727 (1960)	7
Bates v. *Little Rock*, 361 U. S. 516 (1960)	15
Boyd v. *United States*, 116 U. S. 616 (1886)	16
Breard v. *Alexandria*, 341 U. S. 622 (1951)	16
Breithaupt v. *Abram*, 352 U. S. 432 (1957)	7
Buck v. *Bell*, 274 U. S. 200 (1927)	18

PAGE

Escobedo v. *Illinois*, 378 U. S. 478 (1964) 21

Food Machinery & Chemical Corp. v. *Meader*, 249 F. 2d 377 (9th Cir. 1961) 10, 11

Frank v. *Maryland*, 359 U. S. 369 (1959) 16

Gideon v. *Wainwright*, 372 U. S. 335 (1963) 21

Griswold v. *Connecticut*, 381 U. S. 479 (1965) 16, 19, 21

Harman v. *Forssenius*, 380 U. S. 528 (1964) 22

Jacobson v. *Massachusetts*, 197 U. S. 11 (1905) 17, 18

Ker v. *California*, 374 U. S. 23 (1961) 21

Lanza v. *New York*, 370 U. S. 139 (1962) 16

Mallory v. *United States*, 354 U. S. 449 (1957) 21

Malloy v. *Hogan*, 378 U. S. 1 (1964) 21

Mapp v. *Ohio*, 367 U. S. 643 (1961) 21

Massiah v. *United States*, 377 U. S. 201 (1964) 21

McLaughlin v. *Florida*, 379 U. S. 194 (1964) 15

Miranda v. *Arizona*, 384 U. S. 436 (1966) 21

Monroe v. *Pape*, 365 U. S. 167 (1961) 16, 21

Olmstead v. *United States*, 277 U. S. 438 (1928) .. 17

Paduano, et al. v. *City of New York, et al.*, 18 N Y 2d 721 .....2, 3, 12

Paduano, et al. v. *City of New York, et al.*, 24 A D 2d 437[6] 3, 11

Paduano, et al. v. *City of New York, et al.*, 45 Misc 2d 718 .....3, 8, 9, 11, 15

Paduano, et al. v. *City of New York, et al.*, 17 N Y 2d 875 12

Pointer v. *Texas*, 380 U. S. 400 (1965) 17

PAGE

Public Utilities Commission v. *Pollak*, 343 U. S. 451 (1952) 16

Rochin v. *California*, 342 U. S. 165 (1952) 7

Scenic Hudson Preservation Conf. v. *Federal Power Commission, et al.*, 354 F. 2d 608 (2d Cir. 1965) ..10, 16

Schmerber v. *California*, 384 U. S. 757 (1966) 21

Schneider v. *State* (*Town of Irvington*), 308 U. S. 147 (1939) 15

Skinner v. *Oklahoma*, 316 U. S. 535 (1942) 16, 19

Snyder v. *Massachusetts*, 291 U. S. 97 (1934) 17

Statutes:

28 U.S.C. § 1257(3) 3

N. Y. State Constitution, Article 1, § 1 and Article 1, § 11 ..... 7, 16

New York Civil Practice Law and Rules 3211, subd.(a)7 and subd. (c) 11

New York City Health Code § 141.08 effective April 7, 1964 15

New York Civil Rights Law, § 8 21

New York Civil Rights Law, § 50 21

The Constitution of the United States of America:

First Amendment 4

Fourth Amendment 4, 7, 16

Fifth Amendment 2, 4, 7, 16

Sixth Amendment 4

Ninth Amendment 2, 4, 7, 16

Fourteenth Amendment 2, 4, 16

Articles:

	PAGE
31 Federal Register No. 168, p. 11415 (Aug. 30, 1966)	7
Dental Digest, Vol. 60, pp. 170-172 [1954]	9
Cancer Research, Vol. 24, Part I, pp. 751-753 [1964]	9
Proceedings of the Society for Experimental Biology and Medicine, Vol. 117, pp. 686-689 [1964] and Vol. 119, pp. 252-255 [1965]	9
British Medical Journal, issue of October 26, 1963, p. 1064	9
International Archives of Allergy and Immunology, Vol. 7, pp. 70-74 [1955]	9
Acta Medica Scandinavia, Vol. CLVI, pp. 157-168 [1956]	9
Fordham Law Review, Vol. XXIV, number 4, p. 657 et seq. [1955-56]	15
Southern California Law Review, Volume 32, number 2, p. 158 [1959]	15
"Felix Frankfurter: A Tribute", 382 U. S. XV, p. XXII	19

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Petitioners,

against

CITY OF NEW YORK, ROBERT F. WAGNER, as Mayor of the City of New York, and ARMAND D'ANGELO, as Commissioner of the Department of Water Supply, Gas and Electricity of the City of New York,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Petitioners pray that a writ of certiorari issue to review the final order of the Court of Appeals of the State of New York entered therein in the aforementioned case on September 22, 1966, and as amended by said Court by its order of October 18, 1966.

In the court of origin an order and a judgment [one paper] was initially entered in the office of the Clerk of the County of New York on March 10, 1965. An appeal therefrom was taken by petitioners to the Appellate Division of the Supreme Court, First Department; the intermediate court affirmed the order and judgment appealed

from, which order of affirmance was entered in the office of the Clerk of the Appellate Division on June 24, 1965. Judgment pursuant thereto was entered in the office of the Clerk of the County of New York on the same day.

On October 28, 1965 an order was made in the Court of Appeals of the State of New York granting petitioners leave to appeal to it. On June 9, 1966 the Court of Appeals affirmed the order and judgment appealed from. No opinion was rendered. On September 22, 1966 the Court of Appeals denied petitioners' motion for reargument; it granted their application to amend the remittitur. The Court requested the return of that paper from the Clerk of the County of New York and, when returned ordered that it be amended by adding thereto the following:

> "Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution of the United States, viz.: Whether the rights of the plaintiffs-appellants under the Fifth, Ninth and Fourteenth Amendments were violated. The plaintiffs argued that fluoridation is discriminatory because it benefits children only, unlawfully imposes medication on patients against their will and is or may be dangerous to health and, for those reasons, the City program of fluoridation violates the equal protection and due process provisions of the Federal Constitution. The Court of Appeals considered this contention and held that since the fluoridation program does not constitute a significant invasion of fundamental rights there was no denial of the plaintiffs-appellants' constitutional rights." (18 N Y 2d 721)

On October 18, 1966 the Court of Appeals granted petitioners' application to resettle its order of September 22, 1966 and directed that the remittitur be "further amended to substitute the word 'people' for the word 'patients' appearing therein".

Citations to Opinions Below

As already noted, there was no opinion rendered by the Court of Appeals, except the statements contained in its orders, dated September 22, 1966 and October 18, 1966, respectively (18 N Y 2d 721). There was no opinion by the Appellate Division, its determination and order of affirmance stating that the affirmance was "on the opinion of Mr. Justice Brust at Special Term" (24 A D 2d 437 [6]).

There was an opinion rendered in the Supreme Court, New York County (45 Misc 2d 718).

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

Questions Presented

The Court of origin, whose views were adopted by the Appellate Division, and by the Court of Appeals, found that the Supreme Court of the United States has not yet decided:

1. Whether a State in the proper exercise of the police power can force individuals to take medication for non-contagious diseases or illnesses which are not debilitating to the individual concerned and which can be prevented by other readily available and inexpensive means. Hence this is a case of first impression which requires a definitive determination because of the novelty and importance of the issue and its effect upon millions of our inhabitants.

2. Unlike other cases dealing generally with the subject of fluoridation of the water supplies of a

municipality, no issue is raised or presented herein as to the claimed beneficial effects of fluoridation upon young children; rather, the issue is the preservation of the right of bodily privacy, which is a constitutionally protected right as important as any of the rights under the "First", "Fourth", "Fifth", "Sixth", "Ninth" and "Fourteenth" Amendments.

3. Whether, absent compelling need in the interest of a community as a whole and without a showing of a subordinating interest which is compelling, a Board of Health may require the insertion of a drug, chemical or medicine in the water supplies of the City of New York and thus compel its ingestion by all of the municipality's inhabitants.

4. Whether the claim by those in control of the affairs of a community, on the basis of medical or scientific advice, or otherwise, that the fluoridation program in question bears a reasonable relationship to securing the health of some members of the community, justifies the compulsory use or ingestion of a drug, chemical or medicine by all of its inhabitants.

5. Whether fluoridation of a municipality's water supplies, however well motivated, without the claim that it is designed to benefit all of the inhabitants of the community, violates basic constitutional rights, absent informed consent of the persons involved, and whether such a program, which is in the nature of a medical experiment, constitutes a significant invasion of fundamental constitutional rights.

6. Whether, where experts differ as to the possible or probable harmful physical effects upon adults (i.e., those suffering from or having a tendency to diabetes, kidney diseases, allergies, bone ailments and certain difficulties arising during pregnancy), a final judgment should have been rendered merely on affidavits, before

joinder of issue, or whether a trial should have been directed so that the opinions of the experts could be tested by examination and cross-examination. Was denial of a trial a violation of the equal protection and due process provisions of the Federal Constitution?

7. Whether the position for which respondents contended below is one which this Court approves, viz., "if medical science should discover a vaccine preventing cancer, the State [should not] be powerless to require the population to be vaccinated against that noncontagious disease."

The Record

The appeals to the Appellate Division and the Court of Appeals were prosecuted on the original record, i.e., the papers on file with the Clerk of the County of New York in this cause under Index No. 07400/1964.

For the convenience of the appellate courts those filed papers had been arranged in inverse, chronological order and in that order were consecutively numbered. The order and page number of each filed paper appears in the New York County Certificate which is affixed to the original order. References to page numbers in this brief are keyed to such continuing pagination.

All numerical references herein are to the consecutive page numbering of the record as they appear in the County Clerk's Certificate attached thereto, unless otherwise indicated.

On August 19, 1966 an order was made in Supreme Court, New York County, on the consent of the attorney for the respondents and the attorney for the County Clerk given in open court, authorizing and directing the County Clerk to forward to the Clerk of the Supreme Court of the United States the original record herein, consisting of all

the papers on file in the office of the Clerk of New York County under the index number aforementioned. Said order also provided that the respondents may send to the Clerk of this Court at least nine duplicate copies, in printed or photostated index form, of their affidavits and other papers used in Supreme Court, New York County on the respondents' motion to dismiss petitioners' complaint and in opposition to petitioners' cross-motion for a temporary injunction. All the foregoing papers are for use in this Court on petitioners' application for a writ of certiorari or other proceedings in the action, subject to the rules or order of this Court, and the papers so transmitted by the New York County Clerk are to be returned to said Clerk at the expense of petitioners.

Constitutional Provisions and Statutes Involved

Petitioners presented, and the courts below necessarily considered, questions under the Constitution of the United States, namely, whether the rights of the petitioners under the Constitution were violated. Petitioners argued that the fluoridation program is discriminatory because it unlawfully imposes medication on people against their will, is or may prove to be dangerous to health, and invades bodily privacy; for these reasons the equal protection and due process provisions of the Constitution are violated.

The courts below considered petitioners' contention and held in substance and effect, as petitioners construe those decisions, that although compulsory ingestion of a drug, chemical or medicine represents an invasion of fundamental rights, such invasion was not sufficiently "significant" to constitute a denial of constitutional rights.

It has long been the rule that no drug, medicine or chemical may be used on human beings unless the consent of the person required to use the drug has first been obtained. Moreover, the consent must be an informed one. The addition of fluoride to the water supplies is not de-

signed or intended to be for the purpose of maintaining or improving the quality of water or making it safe to use. It has not been suggested by any of the proponents of fluoridation that dental caries is a water-borne disease or that water is a cause of dental decay.

The only exception to this rule is that a chemical may be used in the water supplies for the destruction of bacteria or the prevention of disease when the life or health of the community as a whole is directly concerned. Absent such a situation, or informed consent in other circumstances, the right of the people to be secure in their persons "shall not be violated" (Fourth Amendment). To be compelled to ingest a drug or chemical without consent constitutes a deprivation of liberty without due process (Fifth Amendment). To deprive people of their right to refuse to take a drug, medicine or chemical with their water or food is a denial or disparagement of rights guaranteed by the Ninth Amendment. Not to require consent abridges the privileges or immunities of citizens; such lack of consent deprives persons of liberty without due process and also denies them the equal protection of the laws. Similar provisions are found in New York State Constitution, Article 1, § 1 and Article 1, § 11.

In short, one of the important constitutional questions presented is whether compulsory medication of any kind, however well intentioned and having no relationship to the community's life and health, violates fundamental rights. *Rochin* v. *California*, 342 U. S. 165 (1952); *Breithaupt* v. *Abram*, 352 U. S. 432 (1957); *Anderson* v. *Moses*, 185 F. Supp. 727 (1960); cf., 31 Federal Register No. 168, page 11415 (Aug. 30, 1966).

This Case is Unique

The Supreme Court of New York examined all of the cases which had been presented to this Court and decided by the courts of other states of the United States, as

well as in foreign countries, and then held:

> "* * * As far as this court can determine, the highest courts of our State and of the United States have not yet decided whether a State, in the proper exercise of the police power, can force individuals to take medication in these non-contagious diseases which are not extremely debilitating to the individual concerned and which can be prevented by other readily available and inexpensive means." (45 Misc 2d at 726)

In no case involving the subject of fluoridation was this Court asked to decide whether a state or municipality in the proper exercise of police power may require individuals, without their consent and absent an emergency which is directly related to the security of life and health in the City or State, to take a drug, chemical or medicine for those non-contagious ailments which are not debilitating to the individual concerned and which can be prevented by other readily AVAILABLE and inexpensive means.

The papers and briefs submitted by the parties, and particularly the medical and scientific opinions proffered by them, show that serious belief and conflict exists as to the deleterious effects of fluoridation upon adults, and particularly those persons who suffer from diabetes, kidney diseases, allergies, bone ailments and certain difficulties arising during pregnancy, e.g., Exhibits which are part of the original papers, pp. 477, 478, 479, 480, 481, 484, 485; affidavit of James B. Patrick, an organic chemist, research group leader in antibiotics at Lederle Laboratories, pp. 497-591; affidavit of A. W. Laubengayer, an inorganic chemist and Professor of Chemistry, Cornell University, pp. 592-601; affidavit of George Eugene Kosel, research chemist and former associate in chemistry with the Atomic Energy Commission and the United States Public Health Service, and presently engaged as a research chemist with the Philip A. Hunt Chemical Corporation, pp. 647-655; affi-

davit of Dr. Norton Sager Brown, former president of the New York County Medical Society, pp. 656-657; affidavit of Dr. A. Allen London, a practicing dentist and former president of the New Jersey section of the American Academy of Dental Medicine, and president of the Boonton, New Jersey, Board of Health, pp. 677-707; affidavit of Dr. Simon A. Beisler, former president of the American Urological Association and presently chief of the Urological Service at Roosevelt Hospital, pp. 708-722; Dental Digest, Vol. 60, pp. 170-172 [1954]; Cancer Research, Vol. 24, Part I, pp. 751-753 [1964]; Proceedings of the Society for Experimental Biology and Medicine, Vol. 117, pp. 686-689 [1964] and Vol. 119, pp. 252-255 [1965]; British Medical Journal, issue of October 26, 1963, p. 1064; International Archives of Allergy and Immunology, Vol. 7, pp. 70-74 [1955], Acta Medica Scandinavia, Vol. CLVI, pp. 157-168 [1956].*

The Supreme Court of New York held, and the two New York appellate courts agreed, that petitioners were required to bear the burden of proof of producing scientific evidence as to the harmful effects of fluoridation, and unless and until that burden could be discharged, the judicial branch of our government would not interfere with the determination of a municipality to subject all of its inhabitants to the ingestion of a drug, chemical or medicine. On this point, the court of origin wrote:

> "Until the scientific evidence as to the deleterious effects of fluoridation reaches beyond the purely speculative state now existing, decisional law mandates the holding that the controversy should remain within the realm of the legislative and executive branches of government." (45 Misc 2d at 728)

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* The articles in the six scientific publications were printed in the Appendix of the petitioners' [plaintiffs'] brief in the Court of Appeals at pages A1 through A49 thereof; a copy of that brief is among the original papers forwarded by the New York County Clerk to this Court.

While courts do not ordinarily undertake to substitute their judgments for those of administrative bodies, they must however decide whether the agency [the Board of Health] whose action is called into question has correctly discharged its duties.

In a recent case a public utility sought to construct a pumped storage hydroelectric project on the west side of the Hudson River at Storm King Mountain in Cornwall, New York. A conservationist organization asked the court to set aside orders of the Federal Power Commission which, in effect, permitted such construction. It was charged, among other things, that the Commission was required to compare the proposed project with any alternatives available and, if the utility had alternatives better adapted to development of the river for all beneficial uses, including scenic beauty, the application should have been denied. In that controversy it was contended that there must be assurance that the Commission would adequately protect public interest in aesthetic, conservational and recreational aspects of power development.

The court held that the objecting conservationist group and others were entitled to protect their special interests and unless it had been shown that the Commission had inquired into and considered all relevant facts as to alternative courses, the approval given to the utility's application should be set aside. *Scenic Hudson Preservation Conf.* v. *Federal Power Commission*, 354 F. 2d 608 at 620-22 (2d Cir. 1965).

In *Food Machinery & Chemical Corp.* v. *Meader*, 249 F. 2d 377, 379 (9th Cir. 1961), the court held:

> "Fluorine and fluorides are toxic, and it is recognized that a sufficient concentration can be harmful and may eventually result in death. * * *"

In the same case a number of experts gave conflicting evidence as to the effect of fluoridation in fish and fish eggs

and whether the injury and damage claimed was caused by the ingestion of fluorides. The Court noted that such varying expert testimony presented a triable issue and could only be resolved by a trial (249 F. 2d at 383).

The question which naturally and logically presents itself is whether bodily privacy is not as important as concern over fish and fish eggs, or aesthetic and recreational interests.

Statement of the Case

The Parties and Nature of the Action

Petitioners (plaintiffs below) are citizens, residents and taxpayers of the City of New York; one of them was formerly Commissioner of the Department of Water Supply, Gas and Electricity of that municipality.

This action was brought to declare the water fluoridation program of the City of New York to be unconstitutional and invalid in that, among other things, it violated the Fourteenth Amendment to the Federal Constitution, as well as other constitutional provisions. They sought an injunction.

Respondents (defendants below), without serving a responsive pleading, moved, on affidavits, to dismiss the complaint. The motion was treated as one for summary judgment under the New York Civil Practice Law and Rules 3211, subd. (a) 7 and subd. (c). The complaint was dismissed; the petitioners' cross-motion for a temporary injunction was denied. There was a long and interesting opinion by the Supreme Court, New York County (45 Misc 2d 718).

An appeal was taken by the petitioners to the Appellate Division, which affirmed on the opinion of Special Term (24 A D 2d 437[6]). Thereafter the Court of Appeals of the State of New York granted leave to appeal; however, the determinations in question were unanimously affirmed

on June 9, 1966, without opinion (17 N Y 2d 875). The remittitur was later twice amended, as already observed (18 N Y 2d 721).

The primary issue tendered by the complaint in Supreme Court, New York County, was the constitutionality and legality of the New York City fluoridation program which would necessarily require all inhabitants of New York City who depend upon the municipal water supplies for drinking, cooking and related purposes, to ingest a drug, chemical or medicine which would be placed in those water supplies. Petitioners asserted that the fluoridation program constituted an abridgement of a fundamental personal liberty, i.e., the right not to be compelled to take or ingest a drug, chemical, medicine or toxic substance when neither the safety nor the security of the community is involved.

Petitioners contended that no necessity was shown for the encroachment upon bodily integrity or physical privacy. Petitioners further alleged that the mere claim by the municipal authorities that there was some rational relationship to the effectuation of an asserted proper purpose was not enough where a significant invasion of a right of privacy occurs, for in such a situation, they urged, the promulgating agency is required to show a subordinating interest which is compelling.

Basically the complaint and petitioners' papers maintain that the constitutional right of an individual to be secure in his own bodily person is inviolate, absent an emergency which threatens the health and welfare of the community; such right of bodily privacy is within the ambit of the constitution and is entitled to constitutional protection. The right to be secure in one's physical person is as much entitled to protection under the Federal Constitution as are the civil rights which have been the subject of recent case law in this Court. Put another way, the right not to be compelled to take a drug, chemical or medicine should

have the same protection, petitioners contend, as the right to vote, the right to counsel, the right to prevent illegal search and seizure, the right not to be required to make an involuntary confession, the right to speak, assemble and publish freely, or the right to a fair trial. The rights just enumerated relate to mind and spirit as well as to literary and other property. But those rights and the constitutional amendments which proscribe invasion of those rights apply as well to violations of bodily privacy, physical integrity and protection against medical or scientific experiments upon a person without his informed consent.

Petitioners in tendering the constitutional issue argued that just as an individual, assuming his mental competency, may not without his knowledge, except in an extreme emergency, be subjected to surgery, so, too, he may not be required by a legislative body or an administrative agency to take a medicine, chemical or drug unless such ingestion is required in order to safeguard the life and health of the community.

Reasons for Granting the Writ

Summary of Argument

The decisions below are not in accord with the applicable decisions of this Court in that:

1. The Court of Appeals erred in holding, in effect, that the invasion of bodily privacy was not so "significant" an invasion of fundamental rights as to constitute a denial of constitutional rights.

2. The issue of the right not to be compelled to take a drug, chemical or medicine, absent an emergency situation which involves the life and health of the community, presents a substantial federal question.

3. The right of bodily privacy is as vital and as much entitled to protection as any of the other civil rights; it is as important as the right to a fair trial, the right not to incriminate oneself, the right to counsel, the right to assemble, speak and write freely, the right of privacy in one's home, the right to be secure in one's person, or the right to refuse to have one's name or picture used for certain purposes. It has long been held that the right of privacy, a natural, as well as a statutory and constitutional right, comprehends one's absolute dominion and control over his inviolate personality subject to very few and unusual exceptions not present here.

Argument

The Courts below found that this case presented a constitutional question in that petitioners had contended and argued that fluoridation is discriminatory because it benefits only a segment of the population of the City of New York and unlawfully imposes medication upon people against their will and is or may be dangerous to health, and for those reasons the City's fluoridation program violates constitutional rights.

The State courts considered this contention and held, as petitioners view the determinations by those tribunals, that the fluoridation program did indeed constitute an invasion of fundamental rights but that such intrusion upon bodily privacy does not represent a "significant" invasion of those rights; hence there was no denial of petitioners' constitutional rights.

1. The right of refusal to take a drug is a fundamental one; it may not be abridged simply on a claim that a regulatory rule or ordinance has some rational but limited relationship to the effectuation of a proper city or state

purpose. "Where there is a significant encroachment upon personal liberty [the City or] State may prevail only upon showing a subordinating interest which is compelling." *Bates* v. *Little Rock*, 361 U. S. 516, 524 (1960); see, *Schneider* v. *State* (*Town of Irvington*), 308 U. S. 147, 161 (1939). See, also, *"Fluoridation—Is It Constitutional? No"*, Fordham Law Review, Vol. XXIV, number 4, page 657, *et seq.* [1955-56], and *"Freedom of Religion and the Water Supply"*, Southern California Law Review, Volume 32, number 2, page 158 [1959].

Although the fluoridation program, which compels all of the users of the municipal water supplies to ingest a drug, chemical or medicine, obviously encroaches upon a fundamental personal right or liberty, there is no showing that the New York City Health Code (§ 141.08, effective April 7, 1964), by which fluoridation was prescribed, serves any "subordinating interest which is compelling" or that it is "necessary . . . to the accomplishment of a permissible state [or city] policy".

Respondents contended in the courts below that there is some rational relationship between fluoridation and its claim to be a legitimate subject of Board of Health concern—the reduction of dental caries in young children. The rationalization of this justification is dubious, particularly, as the court of origin observed, in the light of the admitted widespread availability of "other readily available and inexpensive means" of supplying children with fluorine (45 Misc 2d 718, at 726).

2. Since the means for achieving the avowed purpose of aiding children are readily at hand, they should be resorted to without the need to invade the area of protected freedoms and privacies. The decision to use the water supplies is an "easy" way out, but such easy road is not to be followed if it leads down unconstitutional paths. See, *McLaughlin* v. *Florida*, 379 U. S. 194, 196

(1964); *Scenic Hudson Preservation Conf.* v. *Federal Power Comm. and Con. Ed. Co. of N. Y., Inc.*, 354 F. 2d at 620-22; cf., *Griswold* v. *Connecticut*, 381 U. S. 479 (1965); see, e.g., affidavit of Dominick F. Paduano (¶ 11 [1], p. 18, and exhibits thereto attached, pp. 487, 489, 491, 492).

The right not to be compelled to take a drug or a medicine except in the setting of an emergency where the health of a community is directly involved, threatened or affected, is fundamental. The defendants cannot constitutionally abridge this basic right, which is protected by the Fourteenth Amendment to the Federal Constitution and the New York State Constitution, Article 1 § 1 and § 11. It is also a right retained "by the people" within the meaning of the Ninth Amendment. Moreover, the invasion of an individual's physical being and privacy by requiring him to ingest a drug or medicine with his drinking water violates the Fourth and Fifth Amendments. *Boyd* v. *United States*, 116 U. S. 616, 630 (1886); see *Beaney, "The Constitutional Right to Privacy"*, Sup. Ct. Rev. 212 (1962); *Griswold, "The Right To Be Let Alone"*, 55 Nw. U. L. Rev. 216 (1960).

There are a number of cases which, as was said by Mr. Justice Douglas, in *Griswold*, at 485:

> ". . . bear witness that the right of privacy which presses for recognition . . . is a legitimate one."

See, e.g., *Breard* v. *Alexandria*, 341 U. S. 622, 626, 644 (1951); *Public Utilities Commission* v. *Pollak*, 343 U. S. 451 (1952); *Monroe* v. *Pape*, 365 U. S. 167 (1961); *Lanza* v. *New York*, 370 U. S. 139 (1962); *Frank* v. *Maryland*, 359 U. S. 360 (1959); *Skinner* v. *Oklahoma*, 316 U. S. 535, 541 (1942).

The Due Process Clause protects those liberties that are "so rooted in the traditions and conscience of our people

as to be ranked as fundamental." *Snyder* v. *Massachusetts*, 291 U. S. 97, 105 (1934).

In *Olmstead* v. *United States*, 277 U. S. 438, 478 (1928), Mr. Justice Brandeis [in his dissenting opinion] summarized the principles under the Federal Constitution's guarantees of privacy:

> "[The makers of our Constitution] . . . recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure, and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred as against the Government the right to be let alone—the most comprehensive of rights and the right most valued by civilized men."

In *Pointer* v. *Texas*, 380 U. S. 400, 413, 414 (1965), Mr. Justice Goldberg expressed the view that the court should determine in each instance whether a practice, statute or regulation is sufficiently repugnant to the notion of due process as to be forbidden the states.

In *Jacobson* v. *Massachusetts*, 197 U. S. 11 (1905), this Court wrote, at 29:

> "There is, of course, a sphere within which the individual may assert the supremacy of his own will and rightfully dispute the authority of any human government, especially of any free government existing under a written constitution, to intefere with the exercise of that will."

However, the Court also stated, at 29:

> "But it is equally true that in every well-ordered society, charged with the duty of conserving the safety of its members the rights of the individual in respect of his liberty may at times, under the pressure of

great dangers, be subjected to such restraint to be enforced by reasonable regulations, as the safety of the general public may demand."

We are mindful of an extension of the *Jacobson* principle permitting a municipality to anticipate danger due to infectious or contagious disease or to ensure and protect "security of life and health." Under this enlargement, such programs as compulsory vaccination for school children in advance of the outbreak of an epidemic have been sustained. The ultimate expansion of *Jacobson* was reached in *Buck* v. *Bell,* 274 U. S. 200 (1927), where this Court upheld the right of the public health officials of the State of Virginia to sterilize a mental defective. The breadth of *Jacobson* is evident, but the frame of reference was inheritable disease.

> "We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the state for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes . . . Three generations of imbeciles are enough." (274 U. S. 200, at 207)

Even this example of the extreme application of *Jacobson* is founded upon the concept of protection of the populace from a communicable disease. Nowhere does it appear that the court intended by its decision to foist on the citizenry compulsory medication for its own sake.

Thereafter, a retreat is evident and it may fairly be said that a new judicial attitude has evolved. An illustration of

this recession is provided by *Skinner* v. *Oklahoma*, 316 U. S. 535 (1942). There, the court held unconstitutional a statute permitting sterilization of persons convicted three times of certain felonies involving moral turpitude. The majority opinion (Douglas, J.) regarded the statute as a violation of the equal protection clause. The concurring opinions of Justices Stone and Jackson asserted that the due process clause was also breached (at 543-4).

Griswold clearly points the way: future cases involving invasions of physical integrity and privacy will we believe be treated in a fashion consistent with *Skinner* and *Griswold*. Those latter cases indicate the modern trend of this Court to place limits on the exercise by a state or a municipality of its authority under the guise of "police power". Surely, fluoridation represents an invasion of physical integrity without the justification of "conserving the safety" or the "security of life and health" of the community. The insertion of a drug into the water supply is not the same as the granting of a license to sell milk or to regulate in areas in which there is authority to act.

The defendants engage in unwarranted speculation when they assert that this Court's dismissal of several fluoridation cases without fully hearing them or its refusal to grant certiorari is a determination or *sub silentio* comment on the merits. The overburdened docket of the Supreme Court does not permit it to exercise unlimited appellate jurisdiction and a great deal depends on how this tribunal views the State Court's resolution of the controversy underlying the particular case.

In the proceedings in this Court in memory of Mr. Justice Frankfurter, 382 U. S. XV, the Solicitor General observed at page XXII [quoting from Professor Alexander Bickel's "Felix Frankfurter: A Tribute"]

> " 'The very nature of the Court's position in the scheme of American government called upon it to be wisely selective in the choice and restrained in the number of cases it heard and decided. He had no patience

with charges that in denying review the Court was, as the press put it,, "ducking the issue." The Court was not a knight-errant sworn to search out and right wrongs and slay dragons of precedent. It was far better to leave a decision unreviewed than for the Supreme Court to decide it wrongly or prematurely. He believed that the issues the Court chose to review should be ripe for decision and needed time for collective deliberation and decision, and for careful and persuasive exposition of the decision so necessary for its acceptance by the country. Congress had responded most generously to the Court's request for power to control and limit its own docket; to use the power effectively required, so he thought, stern selectivity.' "

The history of the American Revolution which distinguishes it from the French is a lesson for our times; liberation from oppression is only the first phase of revolution and is of no value unless it is followed, as Tocqueville wrote, by the second phase, the establishment of a foundation of individual freedom through constitutional guarantees. Or, put another way—there is no freedom or justice without limits on governmental authority. Those necessary limitations or restraints must be retained or strengthened in the light of proliferating prerogatives of scientific and technical élites and governmental endorsement and enforcement of them.

Good causes have been the traditional excuses for doing violence to the rights of individuals. When the flame of science began to burn some three hundred years ago, the danger to be perceived and now perhaps to be realized is the divination of science and the displacement of other values, spiritual and personal, by the scientists.

3. This Court has been vigilant in the protection of the rights of defendants even in extreme situations following conviction of murder, rape and other serious felonies. Its

concern has been to guarantee a fair trial, to prevent improper self-incrimination, to prevent unlawful search and seizure, illustrated by *Mallory* v. *United States*, 354 U. S. 449 (1957); *Mapp* v. *Ohio*, 367 U. S. 643 (1961); *Ker* v. *California*, 374 U. S. 23 (1961); *Monroe* v. *Pape*, 365 U. S. 167 (1961); *Gideon* v. *Wainwright*, 372 U. S. 335 (1963); *Escobedo* v. *Illinois*, 378 U. S. 478 (1964); *Massiah* v. *United States*, 377 U. S. 201 (1964); *Malloy* v. *Hogan*, 378 U. S. 1 (1964); *Miranda* v. *Arizona*, 384 U. S. 436 (1966).

More recently in *Schmerber* v. *California*, 384 U. S. 757 (1966) this Court permitted involuntary blood tests so as to determine whether the driver of a vehicle was drunk. The tenor of Mr. Justice Brennan's majority opinion indicates the trend to limit invasions of bodily privacy and integrity to a special state of facts and circumstances not present in the instant case, and this is particularly so in light of *Griswold*.

Some states have Civil Rights laws which provide that the right of an individual to be secure in his person may not be violated (e.g., N. Y. Civil Rights Law, § 8). Other provisions of that statute inhibit the use of the name, portrait or picture of any living person for commercial purposes without having first obtained his written consent, and make violation thereof a misdemeanor (id. § 50).

Is the right of privacy as to the use of a name, portrait or picture of a person entitled to more protection than the right of bodily privacy?

Is it more important to provide an accused with counsel than to protect a citizen who is not charged with a breach of any statute from being compelled to take a drug, medicine or chemical against his will?

Is it more important to guarantee a fair trial to a defendant convicted of murder than to see to it that a law-abiding citizen's right to bodily integrity is preserved?

One may not be compelled, except in an unusual setting, to testify against himself. But may he be required to drink municipal water supplies that contain a drug, chemical or medicine which may prove to be toxic to him?

4. This is a proper case for intervention by the nation's highest tribunal. It is not one for the application of the abstention doctrine; the issue of bodily privacy and invasion of one's physical well being would seem to require resolution by this Court. *Cf., Harman* v. *Forssenius,* 380 U. S. 528 (1964). Just as the elimination of the poll tax was made this Court's concern, so, too, the prevention of invasion of bodily privacy would appear to call upon this Court to declare such action either to be improper, as we contend, or constitutionally permissible, as the respondents maintain. Such declaration would end the national controversy over fluoridation, especially as it relates to and involves those directly affected by it but for whom fluoridation is not actually directed or prescribed and for whom it may well prove dangerous.

The issues in the form in which they are tendered by petitioners are bound to arise again in the same or in a substantially similar manner. They call for final resolution. The right to bodily privacy should be brought into line with the other rights which this Court has declared the Constitution protects.

5. In the courts below the respondents contended that a state or a municipality could require vaccination against non-contagious diseases, a doctrine not sanctioned by any case decided by this Court. Under the heading "*Fallacies in plaintiffs'* [*Petitioners'*] *contentions of unconstitutionality*", in one of their briefs, respondents stated their position thusly:

> "If plaintiffs were right in their contention that the state may use immunizing requirements only to combat

contagious diseases, then if medical science should discover a vaccine preventing cancer, the State would be powerless to require the population to be vaccinated against that non-contagious disease." (p. 30. Respts.' Br. in the Appellate Division).

Here, baldly set forth is the case for a wholly homogenized society in which there are to be no rational or reasonable limits to the exercise of authority under the "police power" by those in control of the affairs of a community. In that argument, the defendants fail to perceive the obvious difference between providing medical care or medication, and compelling its use.

The logical extension of respondents' concept and understanding of the proper use of "police power" in "health" situations would permit a Board of Health to require the use of drugs, medicines or chemicals to control population growth, eliminate the desire for alcohol, or the smoking of cigarettes, to mention only three "evils" to which municipal or other authorities might under the authority of this case address themselves.

CONCLUSION

For the foregoing reasons, we urge that this petition for a writ of certiorari be granted.

Respectfully submitted,

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DAVID M. POTTS,
MAX GROSS,
Counsel for Petitioners.

KADEL, WILSON & POTTS,
Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 840

DOMINICK F. PADUANO, KATE F. WHEELAN, JUDITH WEINER and NICHOLAS G. DeJOY,

Petitioners,

against

CITY OF NEW YORK, ROBERT F. WAGNER, as Mayor of the City of New York, and ARMAND D'ANGELO, as Commissioner of the Department of Water Supply, Gas and Electricity of the City of New York,

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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KADEL, WILSON & POTTS,
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Appendix.

OPINION

SUPREME COURT OF THE STATE OF NEW YORK,

COUNTY OF NEW YORK.

DOMINICK F. PADUANO, KATE F. WHEELAN, JUDITH WEINER and NICHOLAS G. DEJOY,

Plaintiffs,

against

CITY OF NEW YORK, ROBERT F. WAGNER, as Mayor of the City of New York, and ARMAND D'ANGELO, as Commissioner of the Department of Water Supply, Gas and Electricity of the City of New York,

Defendants.

Opinion of Mr. Justice Joseph A. Brust of the Supreme Court, New York County, Special I, granting the defendants' motion to dismiss the complaint.

JOSEPH A. BRUST, J. In this action wherein plaintiffs, as taxpayers, seek to enjoin *pendente lite* and permanently, the proposed program for the fluoridation of the municipal water supply of New York City, there are two applications before this court, (1) plaintiffs' application for a temporary injunction, and (2) defendants' cross motion for an order dismissing the complaint.

Plaintiffs assert numerous causes which may be placed into two main categories. They assert that there were procedural defects in the manner in which the fluoridation program was adopted; specifically concerning the manner of appropriating moneys for the implementation of the

program and the alleged failure to comply with State law which requires, in plaintiffs' view, a local law before fluoridation can be adopted by the city. The second category concerns, primarily, constitutionally based objections to the program, and assertions that in the present posture of scientific knowledge in this area, fluoridation would be not only improper but unconstitutional.

The complaint sets forth three causes of action and in the second cause, which this court will consider first, plaintiffs allege that the city may not lawfully expend funds for the proposed project because no local law has been passed authorizing such action.

The fluoridation program proposed for this city was formally authorized by a new section 141.08 of the New York City Health Code enacted by the New York City Board of Health on April 7, 1964, which provides as follows:

> "§ 141.08 Fluoridation of public water supply. The public water supply of the city of New York shall be fluoridated in the following manner:
>
> "A fluoride compound shall be added which will provide in such water supply a concentration of approximately 1.0 part per million of the fluoride ion, provided, however, that the concentration of such ion shall not exceed 1.5 parts per million."

This amendment was filed with the City Clerk of the City of New York on April 7, 1964 and took effect on that date in accordance with the provisions of section 558 of the New York City Charter.

The authority of the Board of Health to act in this general area is derived from sections 555 to 558 of the New York City Charter. Subdivision a of section 558 provides that the New York City Health Code "shall have the force and effect of law."

Appendix.

While the New York City Sanitary Code (the predecessor of the present City Health Code, which superseded the Sanitary Code as of Oct. 1, 1959) was in effect, it was repeatedly declared that the Sanitary Code and amendments thereto, had the force of State law. (*Matter of Bakers Mut. Ins. Co.* [*Dept. of Health*] 301 N. Y. 21, 27 [1950].) In *Matter of Bakers Mut. Ins. Co.* in which the validity of an amendment to the New York City Sanitary Code was sustained, the Court of Appeals declared (p. 27): "The intent of the Legislature in providing for such a statutory scheme seems to us to have been simply this: The Sanitary Code of the City of New York is to have within that city the force and effect of State law while elsewhere in the State the [State] Sanitary Code and the Public Health Law of the State are to be supreme (cf. *People* v. *Blanchard*, 288 N. Y. 145)."

In *Metropolitan Assn. of Private Day Schools* v. *Baumgartner* (41 Misc. 2d 560, 564), the court affirmed the same proposition as to the New York City Health Code, stating: "the Health Code of the City of New York has the force and effect of State law within the city's boundaries. (*Matter of Bakers Mut. Ins. Co.* [*Dept. of Health*], 301 N. Y. 21.)"

Subdivision b of section 558 authorizes the Board of Health to add to, alter, or amend any part of the Health Code and to publish additional provisions "for the security of life and health in the city", and subdivision a of section 556 empowers the Health Department to "regulate all matters affecting health in the city".

The power of the board to enact provisions for the furtherance and protection of health has long been established as a constitutional exercise of power (*Metropolitan Bd. of Health* v. *Heister*, 37 N. Y. 661; *People* v. *Blanchard*, 288 N. Y. 145; *Matter of Conlon* v. *Marshall*, 185 Misc. 638 [Supreme Ct., Kings County, 1945], affd. without opn.

271 App. Div. 972 [2d Dept., 1947]; *Quaker Oats Co.* v. *City of New York,* 295 N. Y. 527, 538-539 [1946], affd. *sub nom. Hill Packing Co.* v. *City of New York,* 331 U. S. 787).

Section 3 of article XVII of the State Constitution, effective January 1, 1939, provides: "The protection and promotion of the health of the inhabitants of the state are matters of public concern and provision therefor shall be made by the state and by such of its subdivisions and in such manner, and by such means as the legislature shall from time to time determine." Concerning this provision, it is stated in the Revised Record of the 1938 Constitutional Convention, at page 2133, that it was to validate the police power as then "practiced in the State of New York" and, when applied to public health, such police power is not merely the power to restrain and regulate the use of property, but is rather "a constructive program for the promotion of positive health".

In addition, the New York City Charter Revision Commission Report, dated August 17, 1936, indicates that the charter, effective January 1, 1938, is intended to confer "extraordinary" and "plenary" powers of legislators for the protection of health upon the Board of Health, and the report further states at page 38: "The Board of Health exercises extraordinary police powers affecting the health of the City. By its power to adopt a Sanitary Code the Board has plenary powers of legislation."

In *Matter of Stracquadanio* v. *Department of Health* (285 N. Y. 93, 97) the court stated: "Clearly section 558 of the New York City Charter endows the Board of Health with a broad discretion in the selection of measures by which public health may be protected within the field of its jurisdiction." And, further, in *People* v. *Blanchard* (288 N. Y. 145, 147): "The main business of safeguarding the public health has always of necessity been done by local boards or officers through sanitary by-laws or

ordinances which have been accorded the force of law. (*Metropolitan Board of Health* v. *Heister,* 37 N. Y. 661, 670; *Polinsky* v. *People,* 73 N. Y. 65.)"

Regardless of its validity, the fluoridation program is obviously directed towards the "security of the life and health" of the citizens of New York City, and is an attempt to cope with the serious and growing public health problem of tooth decay and dental neglect, particularly among children. To hold otherwise would require a finding that fluoridation, regardless of its merits, is a measure which has no direct bearing on a public health problem. Adopting plaintiffs' substantive arguments at face value *arguendo,* the most that could be said is that there is a strong difference of opinion as to the value of fluoridation and that it may not be the best means of attacking the problem of tooth decay and dental neglect. However the problem still remains fundamentally one of health and is therefore within the jurisdiction of the New York City Department of Health.

This court finds that the aforementioned new section 141.08 of the New York City Health Code offends no public policy of this State, contravenes no prevailing State statute or municipal ordinance and is not in excess of the Health Department's power (see *Grossman* v. *Baumgartner,* 40 Misc 2d 221, revd. 22 A. D. 2d 100). Accordingly, the second cause of action is legally insufficient and must fall.

The first cause of action is based on an attack upon the procedures used, and to be used to appropriate moneys for the implementation of the fluoridation program. After public hearings duly held by the Board of Estimate of the City of New York and the Finance Committee of the Council of the City of New York, a proposal was adopted by the Council modifying the expense budget for 1963-1964 and authorizing the expenditures of funds from the expense budget for the acquisition and installation of the necessary equipment and facilities.

Plaintiffs assert that this was illegal, claiming that the proper method of appropriating funds for this program should have been by an amendment to the city's capital budget, and that the city is without power to use expense budget moneys for this particular purpose unless the capital budget is amended.

It appears that the fluoridation equipment will be installed in existing city structures and that about 90% of the appropriated sum, exclusive of engineering costs, will be expended for acquisition and installation of equipment. A project need not be handled through the capital budget and capital budget appropriation if it is intended that the costs of the project be met wholly out of the expense budget appropriation and not by any city borrowing. The entire history of the capital budget provisions of the City Charter, as they were amended from time to time, establishes beyond doubt, that the capital budget, as an appropriation document, is concerned solely with capital improvements provided by the device of borrowing and pledging the credit of the city, with the power in the Mayor of the City of New York to extend the limit of such borrowing by not more than 15% above the sum appropriated in the capital budget.

Section 225 of the City Charter provides: "No obligations of the city shall be issued or authorized for or on account of any capital project not included in a capital budget, or in excess of the maximum amount of obligations which may be issued on account of a project as fixed in such capital budget; and no amount may be expended on account of any capital project in excess of the amount appropriated therefor in a capital budget, except that the amount appropriated therefor may be increased by the mayor by not more than fifteen per centum thereof in order to meet any costs required to advance such project."

What is prohibited by the charter is the issuance of any evidence or certificate of obligation by a city borrowing

moneys to provide for a capital project unless such borrowing is provided by a capital budget appropriation. There has been no allegation by plaintiffs or proof that any bonds or other obligations of the city will be issued to obtain funds to finance the program herein. While allowance of capital expenditures through the device of inclusion in the expense budget may afford a method of circumvention of the procedures surrounding capital budget appropriations, this procedure is legally permissible and there is no basis presented for judicial interference in this area.

Accordingly, the first cause of action is legally insufficient and must also fail.

The third cause of action is based on plaintiffs' allegations and contentions (a) that other methods of reducing tooth decay are available; (b) that fluoridation is discriminatory in that it allegedly benefits children only; (c) that fluoridation unlawfully imposes medication on plaintiffs against their will; and finally, (d) that fluoridation "is or may be" dangerous to health. Plaintiffs also contend, in an affidavit submitted herein by a nonparty, that the religious freedom of certain groups in the community will be unconstitutionally impaired by fluoridation. However, no such allegation is set forth in the complaint and, accordingly, this issue is not properly before this court at this time. This court may only concern itself with the issues raised by the pleadings.*

---

* It appears that the allegation of infringement of religious liberty has been determined adversely in other courts and that those determinations, in effect, were affirmed by the United States Supreme Court in its dismissal of the appeal in *Kraus* v. *City of Cleveland* (351 U. S. 935, reported below, 163 Ohio St. 559); see, also, *Dowell* v. *City of Tulsa* (273 P. 2d 859 [Okla.], cert. den. 348 U. S. 912); *DeAryan* v. *Butler* (119 Cal. App. 2d 674, cert. den. 347 U. S. 1012); *Baer* v. *City of Bend* (206 Ore. 221); *Froncek* v. *City of Milwaukee* (269 Wis. 276).

Plaintiffs allege, in effect, on the basis of these contentions, that the city's fluoridation program violates the privileges and immunities clause of the Fourteenth Amendment to the Federal Constitution and also the New York State Constitution (art. I, § 1), the equal protection clauses of both Constitutions, and the due process clause of the Fourteenth Amendment to the United States Constitution. Finally, plaintiffs also claim that the city's fluoridation program violates the New York City Public Health Law in that the city allegedly lacks the power to add any substance to its water supplies which is not related to prevention of water-borne disease or maintenance of the purity and potability of such water supplies.

Both parties hereto have submitted a mass of documentary evidence attesting to the point of view advanced by each as to the beneficial or possibly detrimental nature of fluoridation. In the face of this mass of evidence, this court will deem the defendants' cross motion as one for dismissal on the merits before answer, in the nature of summary judgment, pursuant to CPLR 3211 (subd. [c]).

It has already been noted that the Board of Health has the power to, and did, act in legislative capacity under State legislative authority. It is not disputed that the matter of tooth decay and dental neglect among 500,000 of the city's children presents a growing public health problem. Public hearings were held on November 18 and 19, 1963, by the New York City Board of Estimate and the Finance Committee of the City Council on the proposal to appropriate the funds required for the acquisition and installation of the necessary fluoridation equipment and facilities. The testimony and proofs taken at those hearings, comprising a record of approximately 900 pages, are before the court. The testimony is summarized in affidavits submitted to the court by highly qualified experts, researchers and engineers. The record discloses that 48,000,000 people in the United States and Canada have

been consuming municipally fluoridated water for years without any substantial evidence of harm to health and that 7,000,000 additional people in this country have, for generations, consumed naturally fluoridated waters with a content similar to, or greater than, the one-part-per-million level contemplated for New York City, also without any verified harm to health.

Fluoridation as a public health practice has been exercised in the United States for almost 20 years. It is not disputed that dental caries affect a substantial percentage of our population, particularly the more disadvantaged who are not disposed or able to undertake programs of proper dental care. It is also clear that fluoridation is effective in combatting dental caries among the young, and its effects last through adulthood. Fluoridation of the water supply is also the most efficacious, probably the cheapest, and may be the only practical method of insuring the administration of this drug to the very young.

Plaintiffs assert that other means are available whereby fluorides may be provided for those desirous of using them. But the question before this court is solely whether the means proposed herein are lawful. The existence of other possible remedies is not relevant (*Jacobson* v. *Massachusetts*, 197 U. S. 11; *United States* v. *Carolene Prods. Co.*, 304 U. S. 144). In the *Jacobson* case (p. 35) it was stated: "Since * * * vaccination, as a means of protecting a community against smallpox, finds strong support in the experience of this and other countries, no court, much less a jury, is justified in disregarding the action of the legislature simply because in its or their opinion that particular method was—perhaps or possibly—not the best either for children or adults".

As to plaintiffs' claim that fluoridation is discriminatory for it benefits children only, all that need be said is, that in the usual course, children become adults and that fluorida-

tion will, commencing with the date of its adoption, ultimately affect all.

Plaintiffs lay special emphasis upon "individual liberty" and the compulsive aspect of municipal fluoridation in shrinking this area. In support of this, plaintiffs quote from *Jacobson* v. *Massachusetts* (p. 29), wherein the Supreme Court held constitutional a regulation requiring vaccination, as follows: "There is, of course, a sphere within which the individual may assert the supremacy of his own will and rightfully dispute the authority of any human government, especially of any free government existing under a written constitution, to interfere with the exercise of that will." However, this court also stated: "But it is equally true that in every well-ordered society, charged with the duty of conserving the safety of its members the rights of the individual in respect to his liberty may at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand."

The Court of Appeals of this State similarly upheld the propriety and constitutionality of a vaccination statute (*Matter of Viemeister*, 179 N. Y. 235, 238), stating: "When the sole object and general tendency of legislation is to promote the public health, there is no invasion of the Constitution, even if the enforcement of the law interferes to some extent with liberty or property."

It is true that the issues presented in the afore-mentioned *Jacobson* and *Viemeister* cases involved communicable infectious diseases and did not involve a disease such a dental caries, which admittedly is not a communicable infectious disease. At the worst, if unchecked, dental caries can cause a degeneration of the physical condition of the individual, but its effect upon society generally is, at its best, quite indirect. Nor do those cases which upheld the chlorination of municipal water supplies afford a compelling precedent. The addition of chlorine is effected to remove

existing or threatened impurities in a water supply and to meet the obligation of the supplier, often imposed by statute, to supply pure water to its citizens. The addition of fluorides would serve a far different purpose—one completely unrelated to the purity of the water supply, and not aimed at combatting a threat to health posed by the State of the water supply prior to the addition of fluorides.

Defendants contend that "'The judicial function is exhausted with the discovery that the relation between means and end is not wholly vain and fanciful, an illusory pretense'' (*Williams* v. *Mayor,* 289 U. S. 36, 42) and that "It is not for the courts to determine which scientific view is correct in ruling upon whether the police power has been properly exercised'' (*Chiropractic Assn. of N. Y.* v. *Hilleboe,* 12 N Y 2d 109, 114). The nonfluoridation cases heretofore cited all involved communicable diseases or the regulation or use of equipment which was dangerous to the public generally and, for the reasons above noted, are inapposite. As far as this court can determine, the highest courts of our State and of the United States have not yet decided whether a State, in the proper exercise of the police power, can force individuals to take medication in these noncontagious diseases which are not extremely debilitating to the individual concerned and which can be prevented by other readily available and inexpensive means. Some have argued that in so doing, the government is confusing expediency with obligation, and stepping out of a role of protector of the individual's rights, to one as arbiter of them. They assert that if this right of the State is upheld, it may equally interdict the use of tobacco, alcohol or rich foods, and introduce into the water supply aspirin to prevent headaches, or any other drug that may be developed in the future to prevent any type of disease, such as allergies, etc. It should be here noted that if the condition attacked were in the nature of an "adult" disease, rather than, as

in the instant case, one where the treatment, to be efficacious, must be given to the very young, different considerations would be present. However, the health of our children is a legitimate area of public and governmental concern, whether under the police power of the State, or in the exercise of the State's power to protect the general welfare. It is not shocking to realize that the State, acting in the interest of children, too young to be *sui juris*, may intervene in the parental area.

This question has been presented to the highest courts of several other States and it has been universally held that fluoridation does not unconstitutionally invade the rights of the citizens. (See *DeAryan* v. *Butler*, 119 Cal. App. 2d 674, cert. den. 347 U. S. 1012; *Chapman* v. *City of Shreveport*, 225 La. 859, app. dsmd. 348 U. S. 892; *Kraus* v. *City of Cleveland*, 163 Ohio St. 559, app. dsmd. 351 U. S. 935; *Dowell* v. *City of Tulsa*, 273 P. 2d 859 [Okla.], cert. den. 348 U. S. 912; *Kaul* v. *City of Chehalis*, 45 Wn. 2d 616; *Birnel* v. *Town of Fircrest*, 53 Wn. 2d 830; *Froncek* v. *City of Milwaukee*, 269 Wis. 276, *supra*; *Baer* v. *City of Bend*, 206 Ore. 22, *supra*; *City Comm. of City of Ft. Pierce* v. *State*, 143 So. 2d 879 [Fla.]; *Wilson* v. *City of Council Bluffs*, 253 Ia. 162; *Readey* v. *St. Louis County Water Co.*, 352 S. W. 2d 622 [Mo.].)

In only two cases have the courts voiced even qualified objections to the constitutionality of fluoridation. (See *McGurren* v. *City of Fargo*, 66 N. W. 2d 207 [N. D.]; *Teeter* v. *Municipal City of La Porte*, 236 Ind. 146.) In the latter case, the appellate court based its overruling of the sustaining of defendant's demurrer on the ground that "under the present state of scientific experience and opinion we do not feel we are in a position to hold conclusively as a matter of law fluoridation will not have cumulative toxic effects" (p. 151). However, see *Ferguson* v. *Skrupa* (372 U. S. 726) indicating that, in the field of health

matters, "What is harmful or injurious is a matter for the Legislature rather than the courts". (*Grossman* v. *Baumgartner*, 22 A D 2d 100, 101.) In the *McGurren* case (*supra*) the court held that it would not be unreasonable to find that fluoridation violated an implied contract between the city and its inhabitants that the city would furnish only pure water. Accordingly, except for the two last-cited cases, the approach of the courts has been to uphold fluoridation if it could be found that fluoridation was a reasonable method of preventing a wide-spread detrimental health condition which the executive or legislative branches of the government believed desirable to treat. In effect, the courts have therefore generally held that their review of fluoridation measures is subject to the same limitations as to scope that exist in the customery (sic) review of administrative actions. It should also be noted at this point that the United States Supreme Court has either dismissed appeals or denied certiorari in cases which squarely presented as the primary or sole question for review the constitutionality of fluoridation of a water supply. In the following cases, the appeals were dismissed for want of substantial Federal question: *Chapman* v. *City of Shreveport* (*supra*); *Birnel* v. *Town of Fircrest* (*supra*); in the following cases, certiorari was denied: *DeAryan* v. *Butler* (*supra*); *Dowell* v. *City of Tulsa* (*supra*); *Readey* v. *St. Louis County Water Co.* (*supra*); *Schuringa* v. *City of Chicago* (30 Ill. 2d 504, cert. den. 379 U. S. 964). While denials of certiorari do not constitute decisions on the merits, it is clear that the Supreme Court has repeatedly held that no substantial Federal questions are presented by objections to fluoridation.

The question of the desirability of fluoridation is immaterial. In the face of the overwhelming precedents previously cited, and in accordance with general principles of *stare decisis*, this court sitting at Special Term, feels constrained to deny plaintiffs' application for a temporary

injunction and to grant defendants' motion for a dismissal of the complaint. Until the scientific evidence as to the deleterious effects of fluoridation reaches beyond the purely speculative state now existing, decisional law mandates the holding that the controversy should remain within the realm of the legislative and executive branches of government. While the courts do not have a right to impose fluoridation upon anyone, judicial restraint requires us to adhere to the uniform decisions holding that the executive and legislative branches of government do—at least until some proof is adduced that fluoridation has harmful side effects and therefore is not in the interests of the community. In so holding, the court is aware that no truly applicable analogy exists in other areas of judicially approved government-mandated action. In other cases, where the citizenry is mandated to do something primarily for the benefit of the individual citizen and with at most an indirect effect on society generally, alternatives are usually provided for those members of the public who do not wish to submit themselves to such requirements. For example, the case of compulsory education with the alternative of sending a child to private school comes to mind. This court is also aware that if such harmful effects become evident in the future, almost by definition, damage will have already befallen those forced to partake of fluoridated water by the action herein upheld. However, courts are traditionally, and with good cause, reluctant to act until the harm threatened becomes real, evident, and imminent.

For the reasons above noted, the plaintiffs' motion for temporary injunction is denied, and defendants' cross motion to dismiss the complaint is granted.

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IN THE

Supreme Court of the United States

October Term, 1966

No. 840

DOMINICK F. PADUANO, KATE F. WHEELAN, JUDITH WEINER and NICHOLAS DEJOY,

Petitioners,

against

CITY OF NEW YORK, ROBERT F. WAGNER, as Mayor of the City of New York, and ARMAND D'ANGELO, as Commissioner of the Department of Water Supply, Gas and Electricity of the City of New York,

Respondents.

BRIEF IN OPPOSITION

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PAGE

TABLE OF CONTENTS

	PAGE
OPINION BELOW	1
QUESTION PRESENTED	2
STATEMENT	2
The Health Code Fluoridation Amendment	2
Problem of Children's Dental Health	3
Basic Physiological Facts Regarding Fluoridation	5
Safety of Fluoridation and Absence of Appreciable Physiologic Effects Therefrom Upon Adults	6
POINT I—This Court has repeatedly ruled, in fluoridation cases raising every claim of unconstitutionality here asserted, that this health measure presents no substantial question of violation of constitutional rights	7
a. Growth of the practice of fluoridation under the sanction of unanimous judicial decisions sustaining constitutionality	7
b. Dismissals of fluoridation appeals by this Court, for want of a substantial federal question	8
c. Denials of certiorari in fluoridation cases	9
POINT II—The City's fluoridation program does not violate constitutional rights, since it immunizes children to avert a serious threat to their health and to enhance the public health generally without appreciably affecting the bodily functions or personal existence of adults	10
CONCLUSION	14

TABLE OF AUTHORITIES

PAGE

Cases:

Birnel v. Town of Fircrest, 361 U. S. 10 (1959), rehearing den., 361 U. S. 904 (1959) 8, 9, 12

Chapman v. City of Shreveport, 348 U. S. 892 (1954) 8, 9

DeAryan v. Butler, 347 U. S. 1012 (1954) 9
Dowell v. City of Tulsa, 348 U. S. 912 (1955) 9, 10

Equitable Life Assurance Society v. Brown, 187 U. S. 308 (1902) 9

Jacobson v. Massachusetts, 197 U. S. 11 (1905) 11

Kraus v. City of Cleveland, 351 U. S. 935 (1956) 8, 9

Ohio *ex rel.* Eaton v. Price, 360 U. S. 246 (1959) 9

Paduano v. City of New York, 18 N Y 2d 721 (1966) 2
Paduano v. City of New York, 17 N Y 2d 875 (1966) 1
Paduano v. City of New York, 24 A D 2d 437(6) (1965) 1
Paduano v. City of New York, 45 Misc 2d 718 (1965) 1, 2, 4, 6, 7
Prince v. Massachusetts, 321 U. S. 158 (1944) 14

Readey v. St. Louis County Water Co., 371 U. S. 8 (1962), rehearing den., 371 U. S. 906 (1962) 9, 10
Roschen v. Ward, 279 U. S. 337 (1929) 11
Roschen v. Ward, 29 F. 2d 762 (1928) 11

Schuringa v. City of Chicago, 379 U. S. 964 (1965) 9, 10

U. S. v. Carolene Products, 304 U. S. 144 (1938) 11

PAGE

Constitutional Provisions:

The Constitution of the United States
Fifth Amendment 2
Ninth Amendment 2
Fourteenth Amendment 2

Local Enactment:

New York City Health Code, §141.08 2

Article:

New York Times, Feb. 8, 1966, p. 18 7

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PAGE

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Respondents.

BRIEF IN OPPOSITION

Opinion Below

The decision of the New York Court of Appeals, affirming, without opinion, the order of affirmance of the Appellate Division, is reported at 17 N Y 2d 875. The Appellate Division had affirmed on the opinion below. 24 A D 2d 437(6). The opinion of Special Term of the New York Supreme Court, thus affirmed, is reported at 45 Misc 2d 718.

The Court of Appeals, in amending the remittitur, stated that it had held that the City's "fluoridation program does not constitute a significant invasion of fundamental rights" (18 N Y 2d 721).

Question Presented

In view of the children's dental health problems confronting the City of New York, are any rights of adults to privacy, equal protection or due process under the Fifth, Ninth and Fourteenth Amendments violated by fluoridation of the City's water supplies in order to protect the health of children and foster the public health generally?

Statement

The Health Code Fluoridation Amendment

Fluoridation of the City's public water supplies is required by an amendment to the City's Health Code adopted by the City Board of Health, effective April 7, 1964 (City's printed papers,* pp. 7-8, App. to Pet., p. 2A, where the text of the amendment, adding new §141.08, is set forth). As Special Term pointed out, provisions of the City Health Code have the force and effect of State law (App. to Pet., p. 3A).

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* References to "City's printed papers" in this brief denote page numbers of the City's printed affidavits and exhibits in support of its motion for judgment and in opposition to Petitioners' motion for a temporary injunction. These papers are bound in an indexed booklet, with printed pagination from pp. 1-205. The booklet is designated as item No. 18 in the N. Y. County Clerk's certificate listing the papers constituting the record (Petition, pp. 5-6).

The Board took this step in order to cope with a major health problem threatening the welfare of 500,000 of the City's children (*infra*, this page and pp. 4-5).

The Health Code amendment, in accordance with the standards prescribed by the United States Public Health Service, specifies in substance that the City's public water supplies shall be treated so as to provide therein a concentration of approximately 1 part per million of the fluoride ion (one pound of fluoride to one million pounds of water), but not in excess of 1.5 parts per million (City's printed papers, p. 8).

Fluoridation of the City's water supplies was begun in the autumn of 1965, following installation of the necessary equipment, and has continued since.

Problem of Children's Dental Health

Studies by the City Department of Health show that of the million children in the City's elementary and junior high schools (public and parochial), approximately 380,000 receive no dental care whatsoever and an additional 120,000 receive inadequate dental care (*id.*, pp. 18-19). This deplorable situation results from family poverty and like factors which are persistent social problems (*id.*, p. 18). The dental services provided by the City Department of Health can meet only one-tenth of the dental needs of these unfortunate children (*id.*, p. 19). It would be impossible to expand these services to furnish the necessary care, even if funds for expansion could be found, because there are not enough dentists in the City who could be enlisted in such projects (*ibid.*).

Where children undergoing such conditions of dental neglect grow to maturity without the benefits of a preventive program, they must inevitably form a large population group burdened and handicapped with lifelong impairment of health and appearance, and suffering heavy economic loss, in terms of constant need for expensive dental care.

There is no controversy as to the foregoing facts. Special Term, with the unanimous concurrence of the Appellate Division, declared: "It is not disputed that * * * tooth decay and dental neglect among 500,000 of the City's children presents a growing public health problem" (App. to Pet., p. 8A).

Numerous scientific studies demonstrate that fluoridation reduces tooth decay among children by 60%-65% (City's printed papers, pp. 19, 40-41). The Petition does not dispute these benefits (Pet., p. 4).

Before adopting the Health Code fluoridation amendment, the City Board of Health carefully investigated the various claimed alternatives to fluoridation, from the standpoint of effectiveness, safety, practicability and scientific validity (City's printed papers, pp. 41-42). The Board found that none of these proposals measured up to these criteria (*ibid.*). For example, in a community in Hawaii having over 4,000 children, it was found after 4 years of experience with a program of administering fluoride tablets, that 1 child out of 8 was taking the tablets (*id.*, p. 41). The Board concluded that fluoridation is the only proven, practicable solution for the major health problem presented by the large proportion of the City's children who are without proper dental care (*id.*, pp. 18-19, 40-42).

Special Term, in effect rejecting the claim of availability of other remedies, stated (App. to Pet., p. 9A):

> "It is also clear that fluoridation is effective in combatting dental caries among the young, and its effects last through adulthood. Fluoridation of the water supply is also the most efficacious, probably the cheapest, and may be the only practical method of insuring the administration of this drug to the very young."

Basic Physiological Facts Regarding Fluoridation

All human beings regularly consume fluorides in their food and, in most cases, in their drinking water, regardless of whether they live in communities which fluoridate their water supplies (City's printed papers, pp. 23-24, 56). Fluorides are naturally present in almost all water supplies (*id.*, pp. 16, 23-24). New York City's water (prior to fluoridation) contained .1 part per million of fluoride (*id.*, p. 23). Fluoridation, therefore, does not mean that a new chemical is introduced into the human body. Everyone consumes fluorides, whether or not the water supplies are municipally fluoridated.

Consumption of fluoridated water builds resistance to tooth decay only during the period of tooth formation, i.e., the first 8-10 years of life (*id.*, pp. 19, 40-41). While consumption of fluoridated water at other ages does not result in this immunizing process, studies show that the heightened immunity to dental caries and other dental benefits acquired by children living in fluoridated communities continue into adult life (*id.*, p. 41). Moreover, in a fluoridated community, eventually every native resident has healthier, more intact teeth, because of the benefits received by all such persons in childhood.

Safety of Fluoridation and Absence of Appreciable Physiologic Effects Therefrom Upon Adults

The City's affidavits, hearing testimony and exhibits, submitted in support of its motion for judgment, set forth the principal elements of the scientific evidence and data which, in the judgment of the leading health authorities of the Nation and the vast majority of qualified scientists, establish the safety and efficacy of fluoridation beyond a reasonable doubt (*id.*, p. 9). Special Term ruled in effect that Petitioners' affidavits and exhibits in opposition did not offer any scientific evidence or proof to the contrary, but rather expressed minority opinions as to the conclusions which may properly be drawn from the known scientific facts. Terming these minority theories as to alleged deleterious effects "purely speculative", Special Term declared in substance that Petitioners had failed to produce any proof that "fluoridation has harmful side effects" (App. to Pet., p. 14A).

The record, therefore, not only demonstrates that fluoridation is safe, but also that it has no significant physiological effects (side effects) on adults.

POINT I

This Court has repeatedly ruled, in fluoridation cases raising every claim of unconstitutionality here asserted, that this health measure presents no substantial question of violation of constitutional rights.

a. Growth of the practice of fluoridation under the sanction of unanimous judicial decisions sustaining constitutionality

Under the sponsorship of the United States Public Health Service and state and local health agencies, and with the approval of the American Medical and Dental Associations and the most respected and authoritative scientific organizations of this country, approximately 60,000,000 people in the United States are presently consuming municipally fluoridated water (N. Y. Times, Feb. 8, 1966, p. 18). Special Term pointed out that fluoridation has been practiced in the United States as a public health measure for twenty years (App. to Pet., p. 9A).

During this period, fluoridation has been challenged in the courts of many states on constitutional grounds. These attacks have been rejected with complete unanimity. Decisions of the highest courts of ten states to this effect are cited in the opinion of Special Term (App. to Pet., pp. 12A-13A).

In seven cases, unsuccessful attempts were made to obtain review in this Court.

b. Dismissals of fluoridation appeals by this Court, for want of a substantial federal question

In three of these cases, appeals to this Court were dismissed for want of a substantial federal question. *Chapman* v. *City of Shreveport,* 348 U. S. 892 (1954); *Kraus* v. *City of Cleveland,* 351 U. S. 935 (1956); *Birnel* v. *Town of Fircrest,* 361 U. S. 10 (1959), rehearing den. 361 U. S. 904 (1959).

In these three cases, every claim of unconstitutionality asserted by petitioners here was presented to this Court in the jurisdictional statements. In these statements, contentions were made that appellants' constitutional rights were being violated in that fluoridation (references denote pages in the jurisdictional statements):

(1) constitutes compulsory medication (*Chapman,* pp. 4, 6-7; *Kraus,* pp. 4, 10; *Birnel,* p. 4);

(2) is or may be harmful to health (*Chapman,* pp. 4, 6; *Kraus,* p. 10; *Birnel,* pp. 6-7);

(3) is directed against a non-contagious disease (*Chapman,* p. 4; *Kraus,* p. 22; *Birnel,* p. 10);

(4) was imposed although other, allegedly safer methods of administering fluoride to children are available (*Kraus,* p. 11; *Birnel,* pp. 7, 9); and

(5) denies equal protection (*Chapman,* p. 4; *Kraus,* pp. 3-4).

It is evident that petitioners, in arguing here that fluoridation violates privacy and bodily integrity in contravention of the Ninth and other Amendments, are simply stat-

ing, in different words, the "compulsory medication" contention which was ruled insubstantial in *Chapman, Kraus* and *Birnel.*

The dismissals in these three cases are decisions on the merits. *Ohio ex rel. Eaton* v. *Price,* 360 U. S. 246, 247 (1959); *Equitable Life Assurance Society* v. *Brown,* 187 U. S. 308, 311, 315 (1902).

c. Denials of certiorari in fluoridation cases

In four cases wherein the constitutionality of fluoridation was upheld by highest State courts, this Court denied certiorari. *DeAryan* v. *Butler,* 347 U. S. 1012 (1954); *Dowell* v. *City of Tulsa,* 348 U. S. 912 (1955); *Readey* v. *St. Louis County Water Co.,* 371 U. S. 8 (1962), rehearing den. 371 U. S. 906 (1962); *Schuringa* v. *City of Chicago,* 379 U. S. 964 (1965).

The petitioners in these cases sought to present to this Court every question of constitutionality raised by Petitioners herein.

The questions alleged were (references denote pages in the petitions for certiorari):

(1) compulsory medication (*DeAryan,* p. 8; *Dowell,* pp. 2-3; *Readey,* pp. 2, 7-8, 16; *Schuringa,* pp. 2-3);

(2) alleged dangers to health (*Readey,* p. 7; *Schuringa,* pp. 2-3);

(3) alleged want of power to act against a non-contagious disease (*Dowell,* pp. 2-3; *Readey,* p. 9);

(4) alleged lack of power because of absence of a public emergency endangering health (*Dowell*, pp. 2-3; *Schuringa*, pp. 2-3);

(5) alleged availability of other methods of protecting teeth (*Readey*, pp. 8-9); and

(6) denial of equal protection (*Dowell*, pp. 2-3; *Readey*, pp. 2, 7-8).

POINT II

The City's fluoridation program does not violate constitutional rights, since it immunizes children to avert a serious threat to their health and to enhance the public health generally without appreciably affecting the bodily functions or personal existence of adults.

(1)

Petitioners' contentions of unconstitutionality consist in essence of the claim that fluoridation imposes compulsory medication or forces consumption of a drug or chemical by individuals, thereby subjecting them to possible dangers to health or to unwarranted impingement upon their bodily processes (Petition, pp. 3-5, 7).

This claim, however, is constructed upon hypotheses that fluoridation has or may have some harmful or other perceptible effects upon adults. As has been shown *supra*, pp. 5-6, such contentions as to untoward effects are directly contradicted by the physiological facts of fluoridation, as established by the record.

The Petition (pp. 4-5), suggesting possibilities of dangers to health, refers to the granting of summary judgment for Respondents without a trial as to the safety of fluoridation and asserts that this raises an issue of due process and equal protection (despite admissions by Petitioners that a preponderance of the scientific evidence and opinion sustains the safety of fluoridation*).

This contention, however, overlooks the precedents demonstrating that where the validity of police power legislation is challenged, the courts may find, without a trial, that a rational basis sustaining the legislation is established by documentary evidence, including affidavits submitted by the health authorities (*Roschen* v. *Ward,* 279 U. S. 337 [1929], affirming 29 F. 2d 762 [Dist. Ct., S. D., N. Y., 1928]) or scientific literature and reports of legislative hearings (*U. S.* v. *Carolene Products,* 304 U. S. 144 [1938]). Controlling here also is *Jacobson* v. *Massachusetts,* 197 U. S. 11, 30, 35-36 (1905), where this Court, in upholding compulsory vaccination, ruled that, if it is evident that there is a rational basis for health legislation involving disputed scientific issues, it is not the function of the courts to decide which group of scientists is right. It should be

* Petitioners attached to their affidavits, as a "thorough scientific analysis and survey of the fluoridation situation" (Paduano affidavit, original Special Term papers, pp. 453-454 [as numbered in the N. Y. County Clerk's certificate listing such papers]), a "Saturday Review of Literature" editorial, appearing in the "Saturday Review" issue of February 15, 1964, which states that the "preponderance of the evidence favors the position of the proponents of fluoridation that side effects are negligible."

Moreover, attached to and made a part of the affidavit of one of Petitioners' affiants is the 1952 report of a select Congressional committee on fluoridation which declares that majority scientific opinion in this country holds that fluoridation "presents no hazard to the public health" (*id.*, p. 693).

noted, moreover, that the *Birnel* decision of this Court (*supra,* p. 8), dismissing a fluoridation appeal, dealt with the dismissal of a complaint.

Petitioners are adults and they do not complain that the immunizing process of fluoridation violates the constitutional rights of children. Petitioners may, therefore, assert only their own alleged constitutional grievances as adults.

As has been demonstrated, the record in this case establishes that fluoridation creates no hazards to health and has no appreciable physiological effects on adults. Consideration of Petitioners' contentions of unconstitutionality, therefore, must be based upon the facts as so established.

(2)

Fluoridation of the City's water supplies does not impinge on individual liberty in any significant respect. The City's Health Code amendment prescribing fluoridation does not compel any person to consume fluoridated water or impose penalties for failure to do so. Unfluoridated drinking water is obtainable from suppliers by those who disagree with the Nation's health authorities. It is also common knowledge, as a result of advertising, that relatively inexpensive defluoridating devices, for home use, are on the market.

Those who drink water from the City's public supplies consume harmless amounts of fluorides in addition to the other chemical additives present therein, such as chlorine, copper sulphate and alum (City's printed papers, p. 24).

Fluoridation does not in any way affect the taste or quality of water, since its fluoride content is tasteless and odorless (*id.*, pp. 23-24, 180-181). Thus, the presence of added fluoride in water supplies causes no inconvenience to any person consuming such water and produces no appreciable impact upon individual pursuits. If it can be claimed that any privilege of the individual is lost through fluoridation, it is the purely abstract and inconsequential privilege of drinking public water supplies without consuming one additional harmless additive which, for all practical purposes as to adults, is inert. This cannot be deemed a significant loss of personal liberty when it is balanced against the important gains in public health produced by fluoridation.

Various combinations of chemicals selected from an assortment of some nine different products are commonly used throughout the United States as additives to municipal water supplies. Some of these chemicals are employed to effect purposes having no connection with the killing of disease-producing organisms or the potability of water. For example, calgon is added to the water in some communities to soften it.

No person consuming municipal water supplies can reasonably contend that he is being "medicated", "treated" or affected by any of these chemicals. This is so because it is scientifically established that ingestion of the minute amounts of such chemicals added to drinking water has no appreciable physiological effects. On the record in this case, adult consumption of the minute amounts of fluoride present in fluoridated water has equally insignificant effects and should, as a matter of logic, be regarded in the same light.

Petitioners' equal protection argument, of course, disregards the fact that fluoridation benefits the entire community, as well as its children, since eventually all residents will have received the immunization benefits in their childhood. It is obvious that fluoridated water cannot be provided to the children in a manner assuring that they will drink it, except by fluoridating the entire City system of public water supply.

Even if the City's fluoridation program were viewed as having a significant impact on adults, Petitioners would fall far short of showing a constitutional grievance. The record in this case clearly establishes a compelling necessity for this program as the only practicable means whereby the dental health of the City's children may be protected and a major public health problem alleviated. In the light of "the interests of society to protect the welfare of children" (*Prince* v. *Massachusetts,* 321 U. S. 158, 165 [1944]), the urgency of this need and the magnitude of the problem plainly satisfy the "subordinating interest" test (Petition, pp. 14-15) and any other standard which may be invoked as a test of valid exercise of the police power.

Conclusion

The Petitioners repeat contentions of unconstitutionality which were submitted to this Court and denied review on seven prior occasions. In three of these instances, this Court ruled, in decisions on the merits, that these contentions do not raise substantial constitutional questions. For twenty-one years, fluoridation has subsisted and grown as a nation-wide public health practice, under the imprimatur of

constitutionality provided by the reiterated, unanimous rejection of these contentions by this Court and many State courts. Petitioners have shown no grounds for a reexamination of these rejected arguments now.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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